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Supreme Court of the United States

No. 338

WELWEL WARSZOWER,
alias "Robert William Wiener," etc.,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Solicitor General in his brief in opposition to the petition herein contends (pp. 6 and 7) that the conflict between the decision below and the decisions in the Ninth Circuit, to which attention was called on page 16 of petitioner's brief, need not be considered by this Court because the question of the insufficiency of the evidence was not properly raised at the trial. This is the first time that any such contention has been made on the part of the Government. In the Circuit Court of Appeals appellant contended that reversal must follow whenever a jury is permitted to base a finding of guilty upon one or more elements of a crime when there was not sufficient evidence to permit the jury to consider one or more of those elements and a separate request for the withdrawal of each element was refused. The Government in no way disputed that contention. Moreover, on the argument in the Circuit Court of Appeals Judge Learned Hand, presiding, acquiesced in the statement of petitioner's counsel on this subject. The opinion of the Circuit Court of

Appeals in no way questions the right of petitioner to raise this contention. This is all the more significant because that same Court had in recent cases such as *United States* v. *Dilliard,* 101 F. 2nd 829; *United States* v. *Rebhuhn,* 109 F. 2nd 512; *United States* v. *Mascuch,* 111 F. 2nd 602 and *United States* v. *Smith,* 112 F. 2nd 83, rejected similar arguments because trial counsel had not in those cases adequately presented the issue at the trial.

The essential difference between that group of cases and the case at bar is that in those cases there were merely motions to dismiss separate counts, whereas in the case at bar there were specific and separate motions to withhold from the consideration of the jury each one of the four alleged false statements, all of which combined constituted but one count. In connection with statement No. 2, which was the allegation of citizenship, counsel made the motion on the express ground "that all the evidence introduced by the Government is in the nature of admissions * * * the important thing is the failure to introduce independent corroborative proof" (R. 199) and the Court's attention was particularly called to the *Duncan* case, 68 F. 2nd 136. It is clear, therefore, that as to this alleged ground of the prosecution's case the attention of the Trial Court was specifically called to the point raised by the petitioner in the Circuit Court of Appeals and urged upon this Court. (See also R. 200.) It will not do, therefore, for the Solicitor General now to say (p. 7) that the petitioner should have requested that only those statements be submitted to the jury which had been properly proved false. That is just what petitioner did at the trial, by asking that there be withheld from the jury the consideration of the statements which petitioner contended had not been properly proved false.

Likewise, with regard to the fourth statement, the one dealing with residence abroad (see R. 203), a similar motion was made on the ground that there was a failure of corpus proof "and admissions standing on their own here are not sufficient to let the matter go to the jury" (R. 205).

Petitioner preserved all his rights by excepting to the denial of both these motions (R. 200, 205). It would have been impertinent after such rulings to have excepted to the Court's charge that the jury might base a conviction upon any one of the four statements alone. Surely if the Trial Court was right in submitting all four statements to the jury then its instruction was right that the jury could find on the basis of any one of them. The error of the Trial Court was not in the charge, but in the denial of the motions to withdraw these two statements from consideration by the jury. The instruction merely made prejudicial to petitioner the error of those rulings. That is clearly established by the cases cited in the original brief on page 17.

These cases hold that prejudice will be presumed where a jury is allowed to base a verdict upon evidence improperly before it, since no one can say upon which phase of the case the verdict of the jury was based. (See R. 227.)

The Solicitor General further (p. 8) suggests that petitioner has conceded that the falsity of two of the statements was established. Petitioner has conceded only that sufficient proof was produced with regard to two of these statements to permit their submission to the jury. It still remains uncertain how the jury arrived at its verdict.

The cases cited (p. 8) throw no light whatever on this problem because in no one of these cases was a motion made to remove from the consideration of the jury each

one of the elements of the crime which it was later claimed should not have been submitted.

With regard to the second contention, namely, that there was additional corroborative, evidence we can add little to what has already been said in our original brief. We do insist, however, that the *Duncan* case cannot be disposed of in the cavalier manner attempted (p. 10). The reason why the Court in that case commented upon the absence of proof with regard to an application for citizenship was the existence of proof of foreign birth. Obviously, when it has been proved that a defendant was born abroad non-citizenship is a fair inference when it is also established that he never applied to become a citizen. But in the case at bar there was no proof whatever of foreign birth. Consequently evidence with regard to the failure to obtain citizenship is wholly irrelevant and adds nothing whatever to the Government's proof.

The *Duncan* case still remains clear authority for the proposition that admissions alone cannot be used as a basis of conviction and that corroboration may not be drawn from other admissions. Finally, in the *Duncan* case there was not only proof, as here, that the claimed American birth was based on an alleged false entry, but as there is not here, proof that defendant was implicated in the forgery. Nevertheless the Court held there was no corroboration.

Finally, the Solicitor General seeks to support the conviction on the theory that the use of the passport was directly proved (p. 10)—a theory advanced in the Circuit Court but not accepted by that Court. On this point, moreover, the *Forte* case, 94 F. 2nd 236, is directly contrary authority.

It is respectfully submitted, therefore, that the conflict pointed out in our main brief remains, both as to the rule with regard to admissions and as to the extent of the corroboration required.

Respectfully submitted,

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